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ABSTRACT

The concept of "deregulation" of the broadcast media has dominated the regulatory landscape for the past decade, inexorably altering the range of possibilities available for racial and ethnic pluralism in the mass media. Deregulation has created a regulatory atmosphere in which the permissibility of regulation is judged by whether the regulation addresses a market failure that cannot be remedied by reliance on marketplace forces without governmental intervention. The experience of broadcast regulation in the 1980s demonstrates that racial and ethnic access to the broadcast media is not fostered by marketplace forces. Rather, the decimation of prior regulatory mechanisms designed to ensure minority access to the media has resulted in a market that has not produced minority-oriented programming. In the face of a broad-based market failure, it is appropriate to consider renewed regulation to foster racial and ethnic pluralism in the media. Policies that are likely to gain approval in the current regulatory atmosphere are those that incorporate the rhetoric introduced into the regulatory vocabulary by advocates of deregulation. Certain policies have survived largely because of their attractiveness to majority as well as minority elements in the broadcast industry. Other preferences that are substantially endangered, such as comparative licensing preferences for minorities, may be preserved but are not likely to be expanded. New solutions for minority programming access could include renewed public participation in licensing and review of market failures, public interest tax credits, and mandated access to minority elements of the broadcast audience. (Eighty-three references are attached.) (RAE)

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DEREGULATION AND THE FUTURE OF PLURALISM IN THE MASS MEDIA: THE PROSPECTS FOR POSITIVE POLICY REFORM

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DEREGULATION AND THE FUTURE OF PLURALISM IN THE MASS MEDIA: THE PROSPECTS FOR POSITIVE POLICY REFORM

The concept of "deregulation" of the broadcast media, which implies lessened regulatory requirements for broadcast licensees, has dominated the regulatory landscape for the past decade. Its dominance has inexorably altered the range of possibilities available for attempts to encourage racial and ethnic pluralism in the mass media. Deregulation has created a regulatory atmosphere in which the permissibility of regulation is judged by whether the regulation addresses a market failure that cannot be remedied by reliance on marketplace forces without governmental intervention.

The experience of broadcast regulation in the 1980s demonstrates that racial and ethnic access to the broadcast media is not fostered by marketplace forces. Rather, the decimation of prior regulatory mechanisms designed to ensure minority access to the media has resulted in a market that has not produced minority-oriented programming. In the face of a broad-based market failure, it is appropriate to consider renewed regulation to foster racial and ethnic pluralism in the media, even under tests favored by advocates of deregulation.

Policies that are likely to gain regulatory approval in the current regulatory atmosphere are those that incorporate the rhetoric introduced into the regulatory vocabulary by advocates of deregulation. Certain policies have survived largely because of their attractiveness to majority as well as minority elements in the broadcast industry, and those policies are likely to continue to create opportunities for minority broadcasters (such as tax certificates and distress sales). Other preferences that are substantially endangered, such as comparative licensing preferences for minorities, may be preserved but are not likely to be expanded. New solutions remedying the market failure in minority programming and access could include renewed public participation in licensing and review of market failures, public interest tax credits, and mandated access to minority elements of the broadcast audience.

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INTRODUCTION

The mass media exercise a collective societal influence that is unrivaled by any other American institution. The most powerful mass medium, television, exercises that influence by using a scarce public resource -- the electromagnetic spectrum. Because television depends upon a resource owned by the American public to exist, those granted licenses to use that scarce resource are held to a certain accountability in their management of the spectrum. Much as entities managing the nation's environmental resources are held accountable for their actions by a governmental agency, broadcast licensees are regulated by the Federal Communications Commission (the "FCC").

Management of the spectrum is pervasively regulated by the FCC to foster social goals that have evolved over a half-century of legislation and rulemaking. Because Congress, the courts, and the FCC have determined that a diversity of voices are important to communications policy, for example, limits have been placed on the number of broadcast stations any one entity may own. As another example, limits on the type of content that may be presented have been created because of a perception by the FCC that "indecent" programming does not serve the public interest. Similarly, policies fostering racial and ethnic pluralism in the mass media were created by the FCC in the 1970s, in response to perceptions

that the mass media could use its collective influence to promote either racial accommodation or racial polarization.

Twenty years after the initiation of such policies, the societal need for media accommodation of racial and ethnic minorities has been convincingly demonstrated by empirical research. Rather than continue past policies and search for new and more relevant solutions, however, current regulatory policy has focused on "deregulation" and "marketplace regulation," concepts that imply greater freedom for broadcasters to serve the free market rather than a regulatory perception of the public interest. Under deregulation, regulatory intervention in free markets is generally presumed to be invalid unless it is demonstrated that a market failure in the relevant social good has occurred. Past perceptions of the need for pluralism in the mass media have become insufficient regulatory justifications for continued adherence to past policies.

This paper will demonstrate that a market failure in minority-oriented programming has, in fact, occurred. The market has failed minority audiences because minorities exhibit a greater demand for television programming than any other segment of the population, yet the broadcast market does not supply such programming because minorities are perceived as a less important audience to the advertisers who

subsidize television programming. This broad-based market failure justifies regulatory intervention to correct the disparity between demand for minority programming and the supply of such programming. Even under marketplace theories of regulation, then, the FCC should enforce regulatory policies designed to foster racial and ethnic diversity in the mass media.

Policies that should be enforced are those that are designed to facilitate oversight over markets that may not function properly (such as public participation in FCC processes); those acting to correct dysfunctioning markets (such as public interest tax credits and mandated access to encourage minority programming); and current policies that have been maintained and proven effective despite deregulation (such as distress sales, tax certificates, and minority preferences in hearings, lotteries, and multiple ownership rules). Current policies that have proven to be effective should be maintained and expanded, and new policies relevant to marketplace oversight and correction should be instituted.

The future of pluralism in the mass media depends largely upon the ability of minority advocates to adapt their strategies to the current regulatory vocabulary. During the 1960s and 1970s, when minority policies were pioneered, obtaining a finding that encouraging minority access and ownership was in the public interest was sufficient to spur

widespread regulatory action. In the current conservative climate, however, it is necessary for minority advocates to demonstrate the existence of a market failure in minority programming to obtain a finding that it is arbitrary and capricious for the FCC not to correct widely dysfunctioning markets for minority-oriented programming. Adapting such an approach will ensure that diversity in the broadcast media will be encouraged by the FCC in the coming decade as it had been during the decade before the advent of deregulation.

THE NATIONWIDE MARKET FAILURE IN MINORITY-ORIENTED TELEVISION PROGRAMMING

The market for broadcast television programming acts indirectly. The consumers of broadcast television programming are not its viewers, but the advertisers who subsidize the programming (Bates, 1985; Levin, 1980). The viewers, in fact, are the product that is sold to advertisers. The programming that is most likely to be produced is that which appeals to an audience that advertisers value most highly (Noll, Peck & McGowan, 1973). Whether minority-oriented programming will be presented by television, then, depends upon whether such programming delivers a fertile audience for the messages of advertisers.

Two types of audiences are valuable as markets for advertising. First, advertisers are likely to seek a large

audience, prompting broadcasters to tailor programming to attract the larger majority race audience (Levin, 1980:72). Second, advertisers are likely to seek a small, high-income demographic, prompting broadcasters to tailor programming to the young, white audience that controls the greatest amount of disposable income in the United States (Owen, Beebe & Manning, 1974:75; Schmeltzer, 1982:402). Under either likely scenario, the minority population is excluded. Minority viewers, as the FCC has realized, exercise little influence in the market for television programming (FCC, 1979). The broadcast market acting alone fails to create incentives for the production of minority-oriented programming.

Because of the economics of the television market, it is not surprising that the market has failed to produce an adequate amount of minority-oriented programming. What is startling, however, is the sheer magnitude of the market's failure. The minority audience exhibits the highest demand for broadcast television programming of any societal group (Poindexter & Stroman, 1981; Bower, 1973; Steiner, 1963) and displays overwhelming preferences for programming dealing with minority issues and characters (Dates, 1980; Frank & Greenberg, 1980, Greenberg, 1980; Stevenson, 1979). The television landscape, however, is characterized by a stark underrepresentation of minority issues and characters (Weigel, Loomis & Soja, 1980; Butsch & Glennon, 1983). Indeed, representation of minorities in television programming actually

declined from 1973 to 1980 (Seggar, Hafen & Hannonen-Gladden, 1981). When minorities are presented, they generally appear in stereotypical roles and relationships (MacDonald, 1983:150; Reid, 1979; Greenberg & Baptista-Fernandez, 1980). Although there is anecdotal evidence that minority characters have increased in number in recent television seasons, such characters often appear in roles created for white actors or in which issues of importance to the minority community are not addressed (Fife 1987:500 n.13; Broadcasting, 1988).

The societal impact of this market failure is enormous. The images presented by television greatly influence the manner in which the majority interacts with racial and ethnic minorities (Wimmer, 1986:391). Issues of importance to minorities may be understood by the majority through the medium of television (United States Commission on Civil Rights, 1979; Kerner, 1968). Television may foster racial accommodation. Conversely, it may exacerbate racial tensions by ignoring minority issues or by portraying minority characters in limiting, stereotypical roles (Jackson, 1982). When an institution such as television, which defines cultural reality for a majority of American citizens, excludes a segment of the population, it creates an impression that minority issues are unimportant in a societal sense (Holly, 1979:33). In the 20 years since the Kerner Report alerted the United States to its continuing segregation, the chasm between the races has not closed and, indeed, has widened

(Harris & Wilkins, 1988). Because the media have an undoubtable influence on race relations in the United States, policies designed to further racial accommodation should be pursued vigorously.

The market's failure to serve the minority community will have increasing adverse consequences for minority audiences as "society becomes more dependent upon electronically communicated information" (Engsberg, 1983). As television increasingly defines popular culture in our society, absent or degrading minority representations in the media may contribute to widening the social distance between the races (Rothman, 1978:94; Massey, 1981). Minority self-concepts, especially among minority children, could suffer (Dimas, 1970; Reid, 1979). The end result of regulatory nonfeasance in the face of a severe market failure in minority-oriented programming could be an increase in racial stratification in the United States (Fife, 1987; Rossides, 1976:161). The cost of failing to correct such a pervasive and societally significant market failure is enormous.

The existence of a market failure in minority-oriented programming is irrefutable. Under marketplace theories of regulation, intervention into a free market is justified when a market is demonstrably incapable of functioning (Fowler & Brenner, 1982). Research evidence demonstrates conclusively that the television market simply

cannot, without regulatory encouragement, produce programming addressing significant issues of importance to racial and ethnic minorities in the United States. Failure to intervene to correct this dysfunctional market cannot be justified by reference to free-market theories, and can be explained only as a total abdication of regulatory responsibility.

POTENTIAL TECHNIQUES TO MITIGATE THE EFFECTS OF THE MARKET FAILURE

The past decade of deregulation has sharply reduced the regulatory options available to encourage pluralism in the mass media. The current conservative FCC has eliminated almost nine-tenths of its own rules (Broadcasting, 1985). Among those rules have been numerous regulatory policies that were useful in promoting access for minority viewpoints in the media. At what might be characterized as the nadir of the current FCC's foray into heightening the discretion of broadcast licensees at the cost of the listening public, the FCC determined that a station that had encouraged listeners to murder "Jews and niggers" had violated no FCC policies by virtue of its racist programming (Cattle Country Broadcasting, 1985). Although other deregulatory actions have been less explicitly directed toward the issue of race, many policies that have been eliminated or limited have made it more difficult for racial and ethnic minorities to appeal to the FCC to mitigate the market's failure to address minority issues.

Policies that have survived deregulation will be considered first, followed by those that have been eliminated and should be reinstated. Finally, new policies will be suggested for consideration.

EXISTING POLICIES

Tax Certificates

The FCC may issue a certificate deferring capital gains taxation from the sale of a broadcast property when the sale effectuates an FCC policy concerning the ownership and control of broadcasting stations (Internal Revenue Code, 1986). An entity is eligible to receive a tax certificate if the entity to which it sells a broadcast station is at least 50 percent owned by minorities (FCC, 1982). The policy, which was developed by the National Association of Broadcasters, a powerful industry lobbying group, has been popular with majority broadcasters (Honig, 1984:869) because it permits substantial tax savings, which are even more advantageous under the revised tax code (Broadcasting, 1987).

The tax certificate policy is a valuable means to produce diversity in the broadcast market, because it increases the number of stations owned by minority broadcasters. Minorities have traditionally been underrepresented in broadcast ownership -- owning only 147 of a total

of 10,134 broadcast stations and 27 of a total of 4,360 cable television systems (Collins, 1983). Minority ownership has been encouraged because ownership of a station "carries with it the power to select, to edit, and to choose the methods, manner, and emphasis of presentation" of programming (FCC v. National Citizens Committee for Broadcasting, 1978:781). Research, although not conclusive, has demonstrated that minority ownership affects the "relevance, quality, or positioning" of minority-oriented programming (Singleton, 1981; Schement & Singleton, 1981). Recent anecdotal evidence supports the view that minority ownership leads to a greater diversity in broadcast programming (Hart, 1988:57). Minority ownership is one mechanism, then, by which minority-oriented programming may be encouraged.

Distress Sales

When a broadcast licensee has been found by the FCC to have committed a violation of its rules or policies, that licensee is generally not permitted to sell its broadcast station because its license is in danger of being revoked. If the license is ultimately revoked, the licensee will have nothing to transfer. Until the question of the licensee's qualifications to hold the license is resolved, usually through an administrative hearing, the licensee is not permitted to mitigate its potential losses by selling its station. The FCC's "distress sale" policy is an exception to

that general rule because it permits a broadcaster to sell a station, for 75 percent of its market value, to a minority owner even though its license is in danger of revocation (FCC, 1982).

The distress sale policy has resulted in a substantial increase in minority presence in the broadcast marketplace. Between 1978 and 1985, 32 distress sales occurred (FCC, 1985). The policy has become less efficacious in recent years, however, because the current industry-supportive FCC is less likely to place an existing licensee's station in "distress" by finding that the licensee has violated the FCC's rules (Honig, 1984; Broadcasting, 1985). Because the policy has resulted in substantial minority ownership that could foster minority-oriented programming, however, the policy should be retained.

Comparative Hearing Preferences

After a tense confrontation with Congress, the current FCC was forced to abandon its efforts to find that granting preferences to minorities in comparative licensing processes is unconstitutional and should be eliminated. The FCC had indicated its intent to eliminate minority hearing preferences (FCC, 1986), but Congress, in an eleventh-hour tactic spurred by members introducing legislation to codify

the preferences, divested the FCC of authority to eliminate the preferences during fiscal year 1988 (Hart, 1988). With the preservation of the hearing preferences against what is, at best, a tenuous constitutional argument (Wilson, 1988:104), Congress maintained an FCC policy that has substantial promise to influence minority participation in the broadcast industry.

Minority hearing preferences were forced upon an unwilling FCC by its reviewing court, the United States Court of Appeals for the District of Columbia Circuit, because the court found that favorable consideration for minority-controlled entities would increase the diversity of voices in the broadcast market and thus serve the public interest (TV9, Inc. v. FCC, 1973). To obtain credit, a minority owner must be integrated into the management of the station where she will have "an important voice in the station's affairs" (Horne Industries, 1984:668). The presumption is that integrated minority owners will positively influence the diversity of programming on the station.

The minority hearing preference policy, because it requires a minority owner to participate in management of the station, is the most promising of the FCC's minority ownership policies. Minority ownership without management integration may be criticized on the basis that the race of the station's owner, without more, may not improve the performance of that station (Singleton, 1981:199), but requiring

minority owners to participate in station management would be less subject to that criticism. A minority-owned and -managed station obtained through a hearing preference, then, is less likely to be a station where the actual day-to-day programming decisions are made by employees who may not be sensitive to minority issues. Hearing preferences are thus a particularly meaningful mechanism to promote pluralism in the broadcast marketplace.

Equal Employment Opportunity Regulations

The FCC has regulated employment of minorities and women by broadcast licensees not only to end discrimination in the broadcast industry, but also to encourage programming that is responsive to minority and female audiences (National Organization for Women v. FCC, 1977). This goal is met by the FCC's equal employment opportunity regulations, because research demonstrates that a lack of minority-oriented programming can be attributed to lack of minorities in decision-making positions in the media (Thomas, 1984; Jackson, 1982). Rates of minority employment are positively correlated with programming that is responsive to minorities (Honig, 1983:85).

The FCC's equal employment opportunity regulations are a positive regulatory step toward rectifying the market failure in minority-oriented programming. The regulations are hampered, however, by the current conservative FCC's

refusal to enforce the regulations in good faith (Homan, 1988; Television Digest, 1988). Since the regulations were promulgated, their vague terms have presented ample opportunities for broadcast licensees to evade the spirit of the regulations while easily meeting their letter (Kalmanir, 1984:43; Wilson, 1988:96). In 1979, for example, although broadcast licensees reported a total of 267 female officials and managers to the FCC, only 26 of those women were reported as executives in an industry publication (United States Commission on Civil Rights, 1979:36). A 1985 report by the FCC demonstrated, similarly, that employment of minorities, already dismal in the broadcast industry, increased only one percent between 1981 and 1985 (FCC, 1985). Despite a slight gain in employment, "minorities are employed in lower echelon jobs and are just not present on levels where management and program decisions are made" (Collins, 1983:3). Because the position of minority employees is critical to their ability to influence programming (Noble, 1981), vigilant enforcement of the FCC's regulations to ensure that minorities are promoted or hired into such positions is a necessary prerequisite to the regulations' effectiveness.

Encouragement of minority employment in the broadcast industry could result in opportunities for minorities to gain access to the communications media. This access could, in turn, produce minority-oriented programming to mitigate the market's failure to provide such programming. The regu-

lations should thus be retained and strengthened to permit them to be enforced to accomplish the goal of encouraging minority-oriented programming.

Multiple Ownership Rules

The FCC generally limits the number of broadcast stations in which any one entity may have an ownership interest to 12 television stations, 12 FM radio stations, and 12 AM radio stations (Code of Federal Regulations, 1986). Although allowing ownership in such a large number of broadcast properties is itself the product of deregulation and has the effect of concentrating industry ownership in the hands of fewer, more powerful majority owners (Compaine, Sterling, Guback & Noble, 1982), thus making access by fledgling minority entrepreneurs to broadcast facilities more difficult (Hammond, 1983), the FCC included in its relaxed rule an exception for minority-owned enterprises.

Under the minority exception, an entity may have an ownership interest in up to 14 television stations, 14 FM radio stations, and 14 AM radio stations if at least two of the stations in each service are at least 50 percent owned by minorities (Code of Federal Regulations, 1986). This exception has led group station owners to approach minority-owned organizations to form partnerships with minority investors that could take advantage of the exception (Broadcasting,

1987). This aspect of the FCC's rules could lead minority owners directly into the most powerful communications companies in the United States, thus providing significant opportunities for minorities to influence the direction and programming of such companies. Although the potential for use of this rule is largely untapped, it has resulted in minority ownership of at least one major television station (FCC, 1987) and could be efficacious in other circumstances. It is thus an aspect of the FCC's rules that should be maintained.

Miscellaneous Provisions

Several minor policies that have evolved throughout the years also have some benefit for minority audiences. In the FCC's lottery proceedings, the FCC is required by Congress to grant "significant preferences" to groups that are "underrepresented in the ownership of telecommunications facilities" (Communications Act, 1986). The allocation of frequencies by lottery, in such services as low-power television, arguably fails to distribute scarce spectrum resources in a manner that effectuates the FCC's public interest mandate (Kendrick, 1983:285), but the inclusion of minority preferences in the chance system mitigates its untoward effects to some degree.

Other miscellaneous preferences have developed through various FCC adjudicatory proceedings. Although the

current FCC has sought to limit the use of such preferences (Tampa Broadcasting Corp., 1986), the preferences have not been eliminated by rulemaking and are potentially useful. First, rules limiting certain AM broadcasters to daytime-only operation have been waived to permit minority broadcasters to provide nighttime service to underserved audiences (Atlas Communications, 1967). Waivers of rules against trafficking in FCC licenses and waivers of multiple ownership rules "might be appropriate where minority ownership is thereby increased" (FCC, 1983:5944; FCC, 1985). Finally, fostering minority ownership may permissibly be considered in allocating powerful clear-channel AM radio frequencies (Loyola University v. FCC, 1982).

Such miscellaneous preferences should be maintained for use in adjudicatory contexts that present unique factual situations in which minority audiences could be served by waiver of an FCC rule or policy. The unification of such preferences in a rulemaking could increase their efficacy by generating broader awareness of the scope of the preferences, and is an action that should be considered.

POLICIES THAT HAVE BEEN LIMITED BY DEREGULATION

Deregulation implies a fundamental shift in the regulatory paradigm. Under a system of FCC regulation and

oversight, members of a broadcast station's audience have market power akin to that exercised by consumers in a traditional market because they have the ability to appeal to the FCC when the market fails to meet their needs. When the FCC removes that regulatory oversight, however, the audience is stripped of its market power and the advertiser becomes the sole consumer in the market for broadcast programming. The viewer who is less attractive to advertisers is rendered powerless in the broadcast marketplace; moreover, the marketplace itself is deprived of the system of checks and balances that permits it to serve the public rather than simply the advertiser. The current regulatory posture has become intolerable because deregulation has eliminated FCC oversight designed to ensure that broadcast licensees remain accountable to those they are licensed to serve. Regulatory mechanisms designed to reorient the broadcast market to public service should thus be reinstituted and expanded if the broadcast market is to function acceptably.

The Fairness Doctrine

The FCC has ended enforcement of the set of obligations known as the Fairness Doctrine (Syracuse Peace Council v. Station WTVH, 1987). The Fairness Doctrine required broadcast licensees and cable operators to (1) affirmatively seek to cover controversial issues in their communities, and (2) provide a reasonable opportunity for the discussion of

contrasting viewpoints on the controversial issues that are covered (p. 2, n.2). The FCC reasoned that the Fairness Doctrine violated the First Amendment rights of broadcast licensees and has thus refused to enforce it. Although it is expected that Congress will eventually be able to codify the Fairness Doctrine despite past and threatened presidential vetoes (Television Digest, 1988), and the FCC's elimination of the doctrine may not survive judicial review, the Fairness Doctrine will not, for the foreseeable future, be among the devices available to foster pluralism in the broadcast media.

The Fairness Doctrine was an effective tool for gaining minority access to the electronic media (Weissman, 1981:562). Indeed, the pivotal case establishing viewers' rights to intervene in FCC adjudications involved a Fairness Doctrine complaint against a broadcast licensee that had exercised blatent racism in its programming (United Church of Christ v. FCC, 1966). The doctrine allowed "minority groups around the country to assert themselves in broadcast matters" (Broadcasting, 1971:36) and permitted minority protesters to challenge a lack of minority programming and an insensitivity to minority issues. In its absence, even the most offensive racist programming -- such as broadcasts advocating "cleansing the earth" of "black beasts" -- is simply not actionable (Cattle Country Broadcasting, 1985).

The Fairness Doctrine is a necessary corollary to a free market system in broadcasting that should be reinstituted, not only as a matter of public interest accountability but as a mechanism to control the potential dysfunctions of the broadcast market. If a certain type of critically important programming is not produced in the broadcast market, the Fairness Doctrine provides a mechanism by which (1) interested parties may pressure broadcast licensees, who may be ignoring the needs of their audiences, to cover certain issues in their programming and (2) interested parties may obtain access to the media for the presentation of programming that is in demand in the marketplace. Thus viewed, the Fairness Doctrine is an essential mechanism to guarantee that the broadcast market works as it is intended and that the viewers of programming have power in the market-place to ensure that their needs are met.

Ascertainment

The FCC's former policy requiring broadcast licensees to ascertain community needs incorporated guidelines for licensees to utilize in contacting various citizens' groups in order to determine the needs of the community. Although general informal ascertainment of community needs is still required, the FCC does not require any guidelines to be followed in ascertaining needs, has no requirements that ascertained needs actually be addressed in programming, and

does not require the results of ascertainment to be reported to it (FCC, 1981). Ascertainment is a potentially efficacious process by which the needs of the minority community may be made known to broadcast licensees, and guidelines to ensure that licensees actually perform effective ascertainment should be reinstituted.

The requirement that licensees consult with citizens in their communities of license is a technique by which minority groups may gain recognition by licensees and gain a certain amount of influence over broadcast programming. The combination of ascertainment and the potential for public participation in the FCC's processes, discussed below, led to citizens' groups being able to obtain commitments from broadcasters to produce programming that is responsive to the needs of the minority community. The positive potential of ascertainment is lost when the FCC requires no set policy to be followed, and, in fact, does not require that minority groups be among those consulted in determining community needs. To reinstitute the positive possibilities inherent in ascertainment of needs and recreate an atmosphere in which minority groups are seen as valuable allies in a broadcast market, the FCC should reinstitute its ascertainment guidelines and reporting requirements. Such a reinstitution is a common-sense recognition that a broadcast licensee should be in touch with the demands of its community as well as the

demands of its advertisers, and is a mechanism that can permit the broadcast market to function more effectively.

Public Participation

Public participation in the FCC's processes is the quintessential regulatory device that permits the experiment of deregulation to be implemented. As the FCC itself has recognized, it must rely on the input of the public to gauge the performance of individual broadcast marketplaces (Black Citizens for a Fair Media v. FCC, 1983). Curiously, however, the FCC has raised almost insurmountable obstacles against citizen participation in its processes, even while it claims that it may deregulate markets based on information citizen participation will provide (Hagelin & Wimmer, 1986). For example, comprehensive programming logs that allowed citizens to determine empirically whether a market was serving their needs have been eliminated by the FCC as an element of deregulation (FCC, 1986). Long-form license renewals, which also generated substantial amounts of programming information, have been eliminated in favor of a postcard renewal form (FCC, 1981). Substantially all the information utilized by citizens groups in challenging broadcast licensees' performance before the FCC has been eliminated by the FCC.

Current regulatory initiatives, moreover, threaten to make public participation even more difficult. Pending

proposed rules, apparently pointed directly toward minority group intervenors (Homan, 1987), would characterize much public participation as an "abuse of process" that could be censured by the FCC (FCC, 1987). The use of the FCC's processes to gain legitimate concessions from broadcast licensees by minority groups aggrieved by unsatisfactory performance by a licensee that has pledged to serve the public interest has come to be referred to as "extortion" by the FCC and supporting commenters (Burden, 1987:281). The increasing level of acrimony seen as justified by the broadcast industry against minority groups, an acrimony that is fostered by the current conservative FCC, further makes it difficult for such groups to effectively appeal to the FCC when the industry fails to meet their needs.

Empirical evidence demonstrates that the current deregulatory FCC has hindered public participation in the FCC's processes (Hagelin & Wimmer, 1986:255). Ironically, public participation is the very mechanism by which the FCC has justified much of its deregulatory efforts and is the sole mechanism that can inform the FCC of the performance of the broadcast marketplace. Because the FCC has refused to collect information concerning the workings of the newly deregulated market on its own (p. 224), the FCC is in the contradictory position of stating that the broadcast market can function without regulation while failing to collect or

require submission of information that can prove its presumption of effective market operation.

In order to properly manage a marketplace concept of regulation, it is necessary to create and expand policies that permit the FCC to oversee the performance of the various broadcasting markets throughout the country. Public participation is the central mechanism by which this objective can be attained. Policies requiring broadcast licensees to collect information for public inspection and submission to the FCC should thus be reconsidered and renewed, to permit the public and the FCC to oversee the experiment of deregulation. Moreover, the FCC should pledge to reinstitute regulatory devices and guidelines in markets that are demonstrably incapable of functioning; when public participation reveals that, for example, minority programming cannot be produced by the workings of the marketplace, the FCC should logically require licensees to produce such programming or grant access to minority groups to allow the production of such programming. Without effective information gathering on the implementation of a marketplace regulation concept, deregulation cannot be seen as a meaningful attempt at an effective regulatory posture, as it claims to be, but as a transparent attempt to allow the broadcast industry to maximize profits at the expense of public service.

NEW REGULATORY MECHANISMS TO MITIGATE THE MARKET FAILURE IN MINORITY PROGRAMMING

Because of the evolving nature of the broadcast marketplace and the theories under which it is regulated, it is appropriate not only to revitalize past policies that have been vitiated or eliminated by deregulation but to investigate new regulatory mechanisms that would be appropriate to mitigate the market failure in minority-oriented programming. The ultimate question to be posed by any new technique, given that a market failure in minority programming has been demonstrated, is the extent to which that technique would aid in overcoming the market's lack of incentive to produce such programming. Two avenues to encourage production of certain programming exist. First, techniques may be implemented to make programming that the market itself does not value attractive to broadcasters. Second, techniques to mandate such programming in markets where marketplace forces do not already encourage such programming may be implemented. One device under each category is proposed.

Public Interest Tax Credits

The tax certificate, discussed above, has been a successful mechanism by which minority access to the broadcast marketplace has been facilitated. Extending the concept of financial incentives to effectuate non-economic goals would

result in an effective system of public interest tax credits that could mitigate the market's failure to provide inherent incentives for the production of minority-oriented programming.

Providing price incentives for the production of public interest programming works in concert with the broadcast market; "the idea behind these incentives is to provide a monetary recompense for socially desirable programming services so that the marketplace will take account of non-economic concerns" (Bonder, 1984:57) (proposing a varying spectrum-user-fee schedule). Public interest tax incentives could be devised in a parallel manner to the tax certificate policy in the Internal Revenue Code, and could provide deductions or credits to broadcast licensees in direct proportion to the amount of minority-oriented programming produced or the amount of access granted to minority groups (Wimmer, 1986:476). Such incentives would be attractive to the industry and majority broadcasters, as have been the FCC's most successful minority policies (Honig, 1984:869), and would thus be politically feasible.

Any system of financial incentives, however, is open to the criticism that (1) the government should not be in a position to pay broadcasters to produce programming that they should produce as part of their public interest responsibilities, and (2) broadcasters have already been granted the government benefit that recompenses their public interest

programming efforts, i.e., a broadcast license. It should be recognized that financial incentives are offered as a politically viable and pragmatically oriented solution to remedy a market failure in a specific type of programming. Because the market itself does not value such programming, it is appropriate for government to adapt the market to the government's regulatory needs. And, at least in the current regulatory context, no other type of meaningful regulatory device to encourage minority-oriented programming is being implemented. In the absence of any other such policy, it is appropriate and, perhaps, necessary to create a systematic set of incentives to mitigate the market failure in minority-oriented programming.

Mandated Access

Access to broadcast facilities is a critical component of producing programming that meets the needs of the minority community (O'Conner, 1982). A system of mandated access upon request to broadcast facilities could meet this need, and have the corollary benefit of encouraging licensees to produce or purchase such programming.

A system of mandated access to minority groups would be triggered by a demonstrated lack of minority-oriented programming presented by a licensee. In the current context, where programming logs are no longer available, such a lack

of programming could be demonstrated by the monitoring of a representative period. If monitoring discloses that a lack of minority-oriented programming has been produced, the group could request a period of access on the facilities of the broadcast licensee or request simply that the licensee air programming that the minority group has produced (perhaps programming produced for cable television access channels that are available in most cities). The system would thus encourage broadcasters to meet the needs of the minority community and provide a solution to the failure of any particular licensee that does not meet those needs.

Mandated access is not unknown in FCC policy. Because of its concern with the dominance of television networks in controlling local affiliates, the FCC has created a system of local access that requires broadcast licensees in certain markets to devote one hour per prime-time period to non-network programming (Code of Federal Regulations, 1986). A system of mandated access to minority programming would be a much less onerous requirement, as it would require many fewer hours of required programming than does the prime-time access rule currently enforced by the FCC. Moreover, the Fairness Doctrine was just such a qualified grant of access to citizens' groups. A mandated access system would constitute no greater inroad into licensee discretion than the prime-time access rule or the Fairness Doctrine, because a licensee could avert the mandated access provision entirely

merely by producing the public interest programming that it is obligated to produce under the terms of its license. The end result of the policy would probably be similar to other policies that require interaction between broadcasters and active community groups -- the broadcaster and the minority group would probably negotiate strategies for meeting the needs of the minority community through a combination of licensee-produced and minority-group-supplied programming. The policy would thus satisfy its purpose by providing a mechanism by which the market failure in minority-oriented programming could be mitigated.

CONCLUSION

This paper has reflected a recognition that the regulatory methods utilized by the FCC have been perhaps irremediably altered by the rhethoric of marketplace regulation. It has suggested that minority groups adopt, but not endorse, that rhetoric in finding strategies to encourage the market to produce programming relevant to the minority community. The empirical evidence of a market failure in such programming provides sufficient justification for a reviewing court or a future, more moderate FCC to determine that policies to mitigate the market failure must be adopted.

The danger inherent in this approach is, of course, that by adapting the rhetoric of deregulation the minority

community may be seen as legitimizing the result of deregulation. This danger can be easily avoided by retaining current efforts to make gains by reference to the public interest responsibilities of the FCC, but by adding the marketplace arguments as an alternative basis to justify the particular relief sought. Deregulation has been largely a failed experiment, representing perhaps the most egregious regulatory abdication of responsibility by a putatively independent government agency in recent years. While the utilization of the vocabulary of deregulation may seem tantamount to a voluntary association with a corrupt concept to some advocates of minority causes, it should also be recognized that the achievement of the goals of minority advocacy is the prime consideration in any choice of strategy. If such goals may be achieved through adhering to the language of marketplace regulation, the ultimate achievement of the goal should be seen as an unqualified success regardless of the means used to attain the end.

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